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In the Supreme Court of the United States

October Term, 1983

No._____

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS, and JOHN CURRIE, constituting the members thereof,

Petitioners

vs.

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP STANLEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the state trial court and state appellate courts have *clearly* ruled in defendant's favor on plaintiff's due process issues, and where the federal district court has also so ruled in defendant's favor in plaintiffs' 42 U.S.C. Sec. 1983 action, does the circuit court of appeals have the authority to disregard the state court rulings and the full faith and credit requirements of 28 U.S.C. Sec. 1738 and remand the case to the federal district court ". . . for consideration of these issues (due process) *which were not encompassed within any state court litigation between these parties*"?

2. Is the recent United States Supreme Court decision in *Migra v. Warren School District Board of Education, et al.*, decided January 23, 1984 (52 Law Week 4151) 104 S.Ct. 892 (1984) dispositive of this case as to petitioner AWC's preclusive defenses of res judicata and collateral estoppel so that the case should be remanded to the federal district court for interpretation and application of Arizona preclusion law?

PARTIES TO PROCEEDING

The parties to this proceeding are those contained in the caption of the case, to wit:

Arizona Western College District Governing Board, Charles McConnell, Walter Kammann, Harold Anderson, Austen Haydis, and John Currie, John F. Cooper, Ronald Costin, Robert J. Garcia, Joe L. King, Ralph Moorehead, Jim R. Pell, Roberta Purdy and Philip Stanley.

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OPINIONS BELOW

All references to exhibits that are not part of the appendix are to the index to the excerpt of record filed in the Court of Appeals for the Ninth Circuit No. CA 83-1794 in two volumes (Exr. Vol____ Dkt____ Ex____), or other portions of the record forwarded to the Supreme Court by the Arizona Federal District Court pursuant to a request for certification and transmission of such record. Said certification and transmission requested by letter to the Arizona Federal District Court Clerk's office dated on or about May 16, 1984 pursuant to Rule 19 of Rules of U.S. Supreme Court.

The opinions of the following courts are unreported and appear in the record that was requested to be

certified and transmitted to this court by the Arizona Federal District Court or are part of the appendix.

1. Yuma County Superior Court Order for Judgment (Arizona trial court) signed by the Honorable Douglas W. Keddie, dated April 28, 1982 (Exr. Vol. I. Dkt. 22, Ex. E, see Appendix C-1).

2. Court of Appeals, State of Arizona, Division I, Department D, Memorandum Decision, dated September 13, 1983 (see Appendix B-1).

3. Transcript of the proceedings before United States District Court for the District of Arizona, the Honorable Walter E. Craig, Judge Presiding, wherein Judge Craig granted defendant A.W.C's Motion for Summary Judgment dated February 14, 1983 (Exr. Vol. II, Dkt. 44A).

4. Memorandum Decision of the United States Court of Appeals for the Ninth Circuit filed December 23, 1983 (see Appendix A-1).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 23, 1983. The petition for rehearing with suggestion for rehearing *en banc* was filed on December 30, 1983 by the defendants/petitioners hereinafter referred to as either defendants, petitioners or AWC. Thereafter, defendants/petitioners filed a motion to exceed the page limitations imposed by Rule 40 of the Rules of Appellate Procedure re petition for rehearing with suggestion for rehearing *en banc* dated January 4, 1984. *Thereafter, the Ninth Circuit Court of Appeals issued its order on February 21, 1984, denying the motion to exceed the page limitation re petition for rehearing with suggestion for rehearing en banc and denied the petition for hearing and to reject the suggestion for rehearing en banc.* The motion for stay of mandate pending application for writ of certiorari to the Supreme Court of the United States was filed by defendant/petitioners on

February 28, 1984 and was denied by order filed March 12, 1984 by the United States Court of Appeals for the Ninth Circuit. A motion to reconsider this motion was filed by A.W.C. on March 12, 1984 and denied by order March 26, 1984 so that the mandate was filed by the United States Court of Appeals for the Ninth Circuit on March 30, 1984. On March 30, 1984 defendants/petitioner A.W.C. mailed to Justice William H. Rehnquist of the Supreme Court of the United States an application for stay of the mandate pending application for a Writ of Certiorari to the Supreme Court of the United States. This was denied by letter notification dated April 4, 1984. This Court's jurisdiction is invoked under 28 U.S.C., Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of 28 U.S.C. Sec. 1738 and 42 U.S.C. Sec. 1983. Copies of these appear in the appendix hereto at D-1 and E-1.

STATEMENT OF THE CASE

Respondent/Plaintiffs, hereinafter referred to as either plaintiffs, respondents or employees, filed three lawsuits based on the same facts: 1)*Special Action* filed on or about February 28, 1977 in state court attempting to have the defendants' actions in non-renewing plaintiffs' employment contracts held null and void as in violation of the Arizona Open Meeting Law;

2) *Federal Action* filed on or about March 1, 1977 in the Federal District Court of Arizona (this present action before the court) seeking due process and damages for due process violations of 42 U.S.C. Sec. 1983. In this federal action the plaintiffs prayed for a *pendente lite* order against the AWC board seeking a due process hearing before an impartial tribunal and other procedural safeguards. In the over 7 years since this suit

was filed in federal court the plaintiffs never sought a hearing seeking the *pendente lite* order to accord them due process procedures and a hearing. Instead the plaintiffs pursued the two state court actions.

3) *State Damage Action* (filed approximately September 1, 1978) seeking damages for breach of contract in violating the open meeting law and by not following due process procedures.

The plaintiffs have lost both state court actions, i.e. 1) *special action* and 3) *state damage action.* The special action did not seek damages but was merely seeking a declaration that the action of the board, taken at three meetings in January of 1977, to nonrenew the employees' contracts with AWC, be declared null and void. A partial summary judgment was issued by Yuma County Superior Court Judge William Nabours on February 2, 1978 in favor of the employees against the board, finding the action taken by the AWC District Governing Board at the meetings of January 11, 12 and 18 of 1977 null and void as to the nonrenewal of the contracts of the employees. AWC appealed and the Arizona Court of Appeals, with then Judge Sandra Day O'Connor writing the opinion, ruled on March 4, 1980, (see *Cooper v. Arizona Western College District Governing Board,* 125 Ariz. 463, 610 P.2d 465 (1980), that there was a genuine question of fact as to whether the board had adopted, affirmed or otherwise reapproved their actions properly in an open meeting so that the case was reversed and remanded for the trial which was held by Judge Nabours on July 9, 1981 with his ruling in favor of AWC being issued on November 9, 1981.

The state court damage action (third action) filed on or about September 1, 1978 was filed because of the initial favorable ruling in the special action (first action). In the state court damage action (third action) the employees

alleged among other things:

> 1. That AWC acted tortiously in not following the requirements of the AWC *handbook* which gave employees *due process protection* (Count 2); and
> 2. That AWC breached employees' contracts by not following the procedures (due process) set forth in the AWC faculty handbook (Count 1). (Emphasis added)

In the federal court complaint plaintiffs alleged these facts as a civil rights deprivation under 42 U.S.C. Sec. 1983.

After the state court trial and findings by Judge Nabours that the AWC Board did not violate the open meeting law, AWC filed a motion for summary judgment which the plaintiffs opposed with a response that read as follows:

> The Arizona Court of Appeals reversed Judge Nabours' ruling concerning the open meeting law violation and remanded the action for further proceedings. After a trial on the merits, Judge Nabours determined that there had been no violation of the Arizona open meeting law; *however, the result reached after that trial does not mean that plaintiffs are not entitled to the damages requested.* (Emphasis added)

The plaintiffs alleged that they had de facto tenure at the college and that they had minimum due process rights under the Fourteenth Amendment. Plaintiffs went on to argue that they had requested a hearing but that this was ignored as the hearing offered by the defendant board would have been meaningless. These issues were met head on in AWC's reply dated February 19, 1982.

Yuma County Superior Court Judge Douglas W.

Keddie's order for summary judgment in favor of defendant board in the state court damage action (third action) contained findings of fact and conclusions of law that also defeated plaintiff's arguments. See Appendix C-1 and Exr. Vol. 1 Dkt. 22, Ex. 3, where the judge stated as follows:

> This court finds that there is no genuine issue concerning these material facts:
>
> . . .
>
> 13. There is an Arizona Western College Faculty Handbook 1975-1976 in which the subjects of *"due process"* and *"non-renewal"* are treated.
>
> a. At page 19 of the handbook, under the title *"DUE PROCESS PROCEDURE"* it is stated that ("Due process procedures are covered independently under the topics of Suspension, Dismissal, Non-renewal, and Demotion.)"
>
> b. At page 21 of the Handbook, under the respective titles "Non-Renewal Procedure" and "Dismissal Procedure", it is provided that a faculty member believing either non-renewal or dismissal unjustifed may "appeal directly to the District Governing Board with or without the aid of legal counsel". Further procedures for the appeal process are not specified in the handbook.
>
> c. The "Non-Renewal Procedure" (page 21 of the handbook) states under "Cause" that a faculty member's contract may not be renewed for, among others, ". . . reasons which are against the best interest of students, the faculty member, or the institution", and, under "Procedure" it provides the faculty member will be notified in writing, which notification ". . . will include the reasons for non-renewal." Similar

statements appear under "Dismissal Procedure".

CONCLUSIONS

When this action was instituted, the plaintiffs relied on the ruling of this court in case numbered 38653 that the actions of the Board taken concerning the plaintiffs in January, 1977 were void. The plaintiffs elected to pursue that theory when they filed that action on March 1, 1977. Apart from their federal action, the plaintiffs elected not to pursue an appeal to the Board by instituting the special action numbered 38653. If, indeed, the Board's actions were void, it could be argued with some force that to appeal a void decision to the body that rendered it would be unnecessary. Whether that argument is valid need not be considered, however, for the final judgment in No. 38653 was that the Board's actions were not void.

The faculty handbook specifically afforded the plaintiffs the right to appeal within the college system, i.e., to the board. That remedy having been available, the plaintiffs should have exhausted it before seeking to recover damages in this court. *Kaufman v. Pima Junior College Governing Board,* 14 Ariz. App. 4675, 478, 484 P.2d 244 (1971). Despite the fact that the board had made the questioned decision as to each plaintiff, it did not thereby become disqualified to conduct hearings before which the plaintiffs could have appeared. See *McClanahan v. Cochise College,* 25 Ariz. App. 13, 18, 540 P.2d 744 (1975). In *Kaufman* the court stated the district board is given the authority to use and

exercise its judgment, meaning the exercise of discretion, not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law. The full opportunity to exercise that discretion would have required that the plaintiffs give the Board the opportunity, through the appeal process, to correct errors the plaintiffs contended the board made in its decisions. Necessarily the appeal process could only be initiated by the plaintiffs.

This court has no difficulty in concluding that as a matter of law the Board did not unreasonably delay in responding through its attorney to the request of the plaintiffs' attorney for a hearing or hearings. Numerous problems were noted by plaintiffs' counsel that had to be addressed before any hearings could be scheduled. But it is not necessary that there now be a ruling that there was no unreasonable delay. had the plaintiffs wished to pursue hearings and if the date of the response of the Board or its content could be construed as a refusal to participate in hearings, plaintiffs could have sought by special action to compel the hearings to be held.

The fact that the Board failed to specify reasons for its decision not to renew the contracts of each of the plaintiffs cannot justify the plaintiffs' failure to appeal to the board. *The letter of the Board's attorney dated March 3, 1977 stated the plaintiffs would be provided with the grounds for the board's action before the hearing.* However, if that response was not sufficient, plaintiffs had a remedy available in the form of special action to force the Board to comply

with the handbook or *to take any other procedural steps which would satisfy any requirements of due process.*

Although the second count sounds in tort, it is, of course, founded on the same actions as the first count which alleges breach of contract. The obligation of the plaintiffs to pursue their administrative remedies is equally applicable to count two.

This court concludes that there is no genuine issue of material fact concerning the failure of the plaintiffs to exhaust their administrative remedies before seeking judicial review of the actions of the defendants, and the defendants are entitled to summary judgment dismissing both counts as to each of them. Therefore, it is ORDERED that summary judgment be entered in favor of the defendants and against the plaintiffs on the complaint.

DATED this 28th day of April, 1982.

s/ Douglas W. Keddie

The plaintiffs pursued an appeal of Judge Keddie's judgment in the Arizona Court of Appeals again pursuing due process issues. Plaintiffs argued that the administrative remedies, including the hearing offered by the AWC board, would have been futile or inadequate and would have been meaningless to cure the due process deprivations alleged. The defendant board again met these arguments concerning the administrative hearing route being futile or the remedies inadequate citing the law from numerous cases and facts in support of the board's position.

The Arizona Court of Appeals in their memorandum decision of September 13, 1983 affirmed the summary

judgment granted in favor of the appellees by the trial court Judge Keddie (see appendix page B-1). The following quotes are taken from the Arizona Court of Appeals memorandum decision (filed September 13, 1983).

(Starting on page 2)

> Appellants first contend that they exhausted available administrative remedies by requesting a hearing in the January 28th letter *because the hearing offered by the board did not comply with either the faculty handbook or with requirements of due process. We disagree.*
>
> Requirements of due process when a teacher's contract is terminated include notice of the charges, notice of the evidence on which the charges are based, a hearing before an impartial tribunal, an opportunity to present witnesses and confront adverse evidence at the hearing. See McClanahan v. Cochise College, 25 Ariz. App. 13, 18, 540 P.2d 744, 749 (1975). *The March 3 letter offered appellants a hearing before the board at which appellants could appear and submit evidence. Prior to the hearing, appellants would be provided with grounds for the board's action.* . . . the March 3 letter stated reasons for the refusal and more importantly invited appellants to respond with further clarification in support for their position. . . .
>
> *The above portion illustrates the board's willingness to resolve the differences over procedures to be followed in satisfying appellant's request for a hearing. In view of this express desire to cooperate with the appellants, we cannot say that pursuit of a hearing would have been futile and that the hearing offered by the board would not have provided an adequate remedy. We note that*

the board had conducted hearings in the past at which employees had been reinstated.

Furthermore, if the appellants believed that the board's response to further discussions about hearing procedures were inadequate, appellants could have brought a special action to compel the board to comply with the faculty handbook or other requirements of due process. (Emphasis added)

In response to the plaintiff's arguments that the board agreed to proceed with the litigation instead of a hearing, the Arizona Court of Appeals at page 8 stated as follows:

Appellants argue that this language indicates an agreement between the parties to proceed with the litigation rather than a hearing.

Appellants misconstrue this language, however. The litigation referred to is not the underlying action in this appeal (damage action), seeking damages resulting from the alleged breach of contract and wrongful termination. *Appellants did not file the damage action until September, 1978, more than one year later.* Rather, the May 6 letter (from the AWC Board) reveals that counsel for the board believed that the board could suspend any plans for a hearing because the issues of whether such a hearing was required and how it should proceed would be resolved in the suits pending in state *and federal court.* Contrary to appellant's assertion, the board did not agree that a hearing was totally permissive and that appellants could immediately seek judicial review by pursuing this damage action.

. . .

Appellants made a tactical decision to challenge the board's action by alleging that the board had violated the open meeting laws, rather than participating in the hearing offered by the board (see page 9). The trial court initially found a violation in February of 1978 which the board promptly appealed. Consequently, appellants were aware of the possibility of the reversal on the open meeting question long before they filed the damage action in September of 1978. . . . In summary we agree with the trial court's findings that appellants failed to exhaust their administrative remedies. *Long before this particular litigation was commenced appellants had received clear notification from the board's counsel that the board was willing to give appellants an appropriate hearing comporting with any applicable due process requirements.* Consequently, the court correctly determined that by reason of their failure to proceed with a hearing appellants were precluded from seeking judicial review of the board's nonrenewal decision. We affirm the summary judgment granted by the trial court. (Emphasis added)

After Judge Keddie's favorable ruling in the state damage action (third action) *and before the Arizona Court of Appeals ruled on plaintiff's appeal from that judgment,* AWC filed a motion for summary judgment in this *federal action* alleging various affirmative defenses including estoppel, *res judicata,* laches, waiver and abandonment, because the Arizona state court judgments answered all of plaintiff's allegations in their civil rights complaint under 42 U.S.C. Sec. 1983 (see AWC motion for summary judgment in this court, pages 39 through 53, Exr. Vol. II, Dkt. 22). The plaintiffs in response (see Exr.

Vol. II, Dkt. 29) denominated plaintiff's response to defendant's motion to dismiss or in the alternative for summary judgment and plaintiff's cross motion for summary judgment, argued at pages 27-33 that their claims were not barred by the doctrines of *res judicata,* collateral estoppel, abandonment, waiver or laches. *Although plaintiffs argued their constitutional rights in the state court before Judge Keddie and the Arizona Court of Appeals they stated in their federal response at page 28, lines 11-15 as follows:*

> In addition, *the state damage actions did not involve an alleged deprivation of plaintiff's constitutional rights.* (See Exhibit D to defendant's motion to dismiss.) *The state damage actions were based solely on the initial ruling in favor of plaintiff in the Open Meeting Law litigation.* (Emphasis added)

In AWC's reply to the plaintiff's response to defendants motion to dismiss or in the alternative for summary judgment filed January 7, 1983, Exr. Vol. II, Dkt. 34, defendant AWC again met the plaintiff's arguments head on in regards to the applicability of the affirmative defenses of *res judicata* and collateral estoppel, at pages 21 through 29

Judge Craig at the time of the hearing on the Motion for Summary Judgment on February 14, 1983 stated at page 16 of the transcript, (Exr. Vol. 2, Dkt 44A) as follows:

> Even assuming *de facto* contractual relationship, *the District offered a hearing to these people, complying with due process requirements,* and the Board offered a full and complete hearing on the issues presented. I don't think they are properly here. The motion will be granted. (Emphasis added)

Plaintiffs thereafter timely filed a Notice of Appeal and thereafter their opening brief. AWC's brief once again argued that AWC had offered plaintiffs the very thing they sought, due process, and the hearing offered would not have been futile or meaningless and that the affirmative defenses of *res judicata,* collateral estoppel, waiver, abandonment, laches, doctrine of abstention and good faith applied.

Prior to oral argument to the U.S. Ninth Circuit on or about November 15, 1983 the Arizona Court of Appeals issued its memorandum decision (see appendix page B-1) which AWC forwarded to the Ninth Circuit Court of Appeals as a supplemental citation. After oral argument the U.S. Ninth Circuit entered its order reversing and remanding the case on December 23, 1983.

REASONS FOR GRANTING THE WRIT AS TO QUESTION 1.

This is a case that should be reviewed by the Supreme Court of the United States even though it is in an interim status. *There is an obvious error here by the U.S. 9th Circuit Court which undermines the final decision, on a federal question, by a state court of last resort* (see Rule 17.1(a) of the Rules of the Supreme Court). Plus, there has been an intervening decision by the U.S. Supreme Court that is controlling (see Question 2 and Rule 17.1(c) of the Rules of the Supreme Court). At this time in history in this country our basic form of government, especially the adequacy of the judicial system, is being put in question. It is easy to see why. This case is a perfect example of why the people at the grass roots level do not trust the judicial system and question its adequacy and competency. The people in Yuma, Arizona know that two previous cases filed by the plaintiffs have been decided in the state court in favor of the defendants Arizona Western College. The people in Yuma, Arizona know

that the federal constitutional issues of due process were decided in the state courts of Arizona through the final appellate process in favor of defendants Arizona Western College. This federal civil rights action was initially found in AWC's favor at the federal district court level but reversed to consider the due process issues that were already decided in the state courts of Arizona. Besides this, the U.S. 9th Circuit did not even apply their own rules on preclusion as set forth in *Scoggin v. Schrunk,* 522 F.2d 436 (CA 9 1975) which basically follows the recent U.S. Supreme Court case of *Migra v. Warren School District Board of Education, et al.,* decided January 23, 1984 (52 Law Week 4151), 104 S.Ct. 892 (1984).

The Ninth Circuit committed error wherein it is stated at page 2 of their decision:

> We therefore *reverse* the summary judgment and *remand* to the district court *for consideration of these issues* (due process), *which were not encompassed within any state court litigation between these parties.*

In the state court litigation, the specific issue was raised by the plaintiffs that the procedures offered by the AWC Board did not meet due process and that was a specific issue before the Arizona Federal District Court and the U.S. Ninth Circuit. The Arizona Court of Appeals' memorandum decision was filed September 13, 1983 and was immediately forwarded to the U.S. Ninth Circuit as a supplemental citation. Specifically at the bottom of page 2 and the top of page 3 of that Arizona Court of Appeals' opinion the court found that *what AWC offered the plaintiffs was due process which included the grounds or reasons for the Board's actions* being offered to the plaintiffs prior to the hearing.

The Arizona Court of Appeals further found under the evidence that AWC was cooperative and was willing to resolve the differences over procedures, and, therefore pursuit of the hearing was not futile and would have provided an adequate remedy (page 4). The Arizona appeals court additionally found, at page 9, that plaintiffs made a tactical decision to challenge the Board's action by alleging that the board violated the open meeting law, rather than by participating in the hearing offered by the board. The final death blow to plaintiffs is at page 10 where the Arizona appeals court stated:

> Long before this particular litigation was commenced, the appellants had received *clear notification from the board's counsel that the board was willing to give appellants an appropriate hearing comporting with any applicable due process requirements. (Emphasis added)*

The Constitution of the United States Article IV, Section 1 reads as follows:

> Full Faith and Credit shall be given in each State to the Public acts Records, and Judicial Proceedings of every other State. And the Congress may by general Laws, prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

This full faith and credit clause of the Constitution is implemented by the federal full faith and credit statute, 28 U.S.C. Sec. 1738. That statute reads in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the

courts of such State, Territory or Possession from which they are taken.

The U.S. Ninth Circuit either erroneously reviewed the record or are apparently disregarding the Constitution and statute 28 U.S.C. Sec. 1738 in regards to giving the Arizona state court decision full faith and credit. This cannot and should not be allowed.

The defendants AWC, in good faith, charge that this is a true case whereby a gross injustice will result if the Writ of Certiorari is not allowed (see *U.S. v. Lynch,* C.A.D.C. 1983, 690 F. 2d 213). These cases have been going on for over seven years.

In essence, what Yuma County Superior Court Judge Keddie and the Arizona Court of Appeals, and ultimately the Arizona Federal District Court Judge Craig were saying in finding in favor of defendant AWC Board was that the plaintiffs were offered the very thing they say they were seeking and that they were deprived of, due process procedures and a hearing. In this regard this case parallels that of *Suckle v. Madison General Hospital,* 499 F.2d 1364 (7th Cir. 1974).

In both the *federal action (second action)* and in the state court *damage action (third action)* the plaintiffs alleged the failure or refusal of AWC to give them due process as the basis for their cause of action. The very thing they say that they were deprived of, i.e. due process, they refused to accept from defendant AWC board in 1977 or to pursue in their federal court action until after they had pursued their federal claim of due process violations in the state courts.

The plaintiffs have initiated two lawsuits involving exactly the same nucleus of facts. In comparing the state court damage action complaint (third action) and this federal complaint (second action) denominated as a 42

U.S.C. Sec. 1983 Civil Rights violation, it can be seen that the facts alleged are basically the same. Each of the plaintiffs' allegations in their federal complaint under 42 U.S.C. Sec. 1983, which was filed on or about March 1, 1977, has been answered by the Arizona judgments in the two state court actions.

The U.S. Ninth Circuit Court's memorandum decision is asking the Federal District Court to look at the case again and determine the ". . . extent to which the board's offer of hearing satisfied them (due process procedural protections)." As stated, this has already been done in the Arizona state courts.

Plaintiffs initially received a favorable ruling in the state court special action which was reversed in the Arizona Court of Appeals with Justice O'Connor writing the opinion; however, prior to the reversal, in approximately September of 1978, a year and one-half after they had filed the first and second actions, plaintiffs filed the third action (the state court damage action before Judge Keddie). Plaintiffs have argued that this third action was purely based on the initial favorable ruling in the first action (special action re open meeting law) before Judge Nabours; however, when Judge Nabours was reversed and the trial was held resulting in a finding of no open meeting law violation plaintiffs changed their minds. After Judge Nabours found in favor of AWC, plaintiffs had two choices. They could have pursued their due process arguments in: 1) the federal court action; or 2) in the state court damage action. They chose to pursue the state action saying even if Judge Nabours' initial ruling of an open meeting law violation was reversed the plaintiffs still suffered due process violations which should be the basis for a favorable judgment. The plaintiffs pursued their federal constitutional due process claim through the state trial court

(third action) to the Arizona Court of Appeals and ultimately filed a Petition for Review before the Arizona Supreme Court.

28 U.S.C. Sec. 1257 (3) provides, in part, that:

> [F]inal judgments . . . rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .

If the plaintiffs felt there was error in the state court's decision on the federal due process claims that were litigated, plaintiff's remedy was by pursuing such argument to the United States Supreme court pursuant to 28 U.S.C. Sec. 1257 (3). Plaintiffs did not do that.

The Ninth Circuit Court of Appeals in its memorandum decision stated that the plaintiffs' claim was that AWC's refusal to renew their contracts, deprived them of property rights in their employment without due process of law stating specifically:

> They (plaintiffs) argue that under the faculty handbook, promulgated under state law, the board could refuse contract renewal only for cause, and that plaintiffs were entitled to greater procedural safeguards that AWC was willing to provide. The district court did not apply *Patsy* because in its view the administrative remedy which was offered was the very procedure for which the plaintiffs had asked. The hearing that AWC offered, however, would have excluded consideration of the issue of cause, and made no reference to other procedural entitlements claimed by plaintiffs. *There are at the very least genuine issues of fact concerning the nature of plaintiffs'*

property interests in their employment, the correlative procedural protections to which they were entitled and the extent to which the board's offer of hearing satisfied them.

We therefore reverse the summary judgment and *remand to the district court for consideration of these issues (due process) which were not encompassed within any state court litigation between these parties.* Reversed and remanded. (Emphasis added)

The finding by the Ninth Circuit Court of Appeals that the due process issues were not encompassed within any state court litigation is simply untrue. The facts and findings cannot be "stretched" to fit the Ninth Circuit's order.

The Court of Appeals is set up to review errors of law. *Veelik v. Atchison T.& S.F.R. Co.* (1955, CA 9 Cal.) 225 F. 2d 53.

Determination of issues of law is a proper function of the appellate court. *F. L. Smidth & Co. V. United States,* (1969) 56 Cust. & Pat. App. 77, 409 F.2d 1369.

In cases where there is evidence from which reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court. *Colby v. Cities Service Oil Co.,* (1958, CA 10 Okla.) 254 F.2d 665.

The function of the court of appeals as a reviewing court is only to ascertain whether the findings of the trial court are clearly erroneous. *Travis v. Schwartz Mfg. Co.* (1954, CA 7 Wis.) 216 F.2d 448.

The U.S. Ninth circuit Court of Appeals has taken a giant step backward in not properly giving full faith and credit to the Arizona state court judgment. The plaintiffs' claims that they were denied due process present-

ed a federal constitutional question which state courts are competent to decide. Absent *certiorari* review in the United States Supreme Court, and none was sought in the proceedings after the final state court appellate review, the Arizona state decision is final and conslusive because only the Supreme Court of the United States will review such a state court decision. As stated in *Brown v. DeLayo,* 498 F.2d 1173 (1974 10th Cir.):

> The teacher's *claim that she was denied due process presents a federal constitutional question* which state courts are competent to decide. (Citing numerous Supreme Court of the United States cases.)
>
> Absent *certiorari* review in the United States Supreme Court, and none was sought in the proceedings with which we are concerned, the state decision is final and conslusive because only the Supreme court may review a State Court decision. (Citation omitted)
>
> A prior state court adjudiation of a federal constitutional right bars a subsequent federal action seeking vindication of the same right. (Citation omitted) The rule applies even though the federal action is brought under Section 1981 and 1983. The Civil Rights Act is not a vehicle for a collateral attack on a final state court judgment.
> (Citing numerous cases) (Emphasis added)

The Ninth Circuit's monumental error is highly prejudicial to defendants and the AWC Board, as these cases have been ongoing for over seven years. Therefore, it is essential that the United States Supreme Court step in and grant the petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT AS TO QUESTION 2

In the recent United States Supreme Court cast of *Migra v. Warren City School District Board of Education,* 104 S.Ct. 892 (1984) the court expressed the central issue to be resolved as the preclusive effect of a state court judgment when a 42 U.S.C. Sec. 1983 issue is raised in federal court when it could have been raised in the earlier state court proceeding. This Court discussed at length the respect that federal courts have for the doctrine of giving the same preclusive effect in a subsequent federal section 1983 suit as enjoyed in the courts of the state where a judgment was entered. One comment made by the Court was enlightening by way of explaining its desire to give very extensive preclusive effect to state court judgments. The Court stated:

> Petitioner suggests that to give state-court judgments full issue preclusive effect but not claim preclusive effect would enable litigants to bring their state claims to state court and their federal claims in federal court, thereby taking advantage of the relative expertise of both forums. Although such a division may seem attractive from a plaintiff's prospective, it is not the system established by Sec. 1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to insure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

The court pointed out:

> Sec. 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments be given in the courts of the state from which the judgments emerged.

The *Migra* case stands for the proposition that 28 U.S.C. Sec. 1738, which provides that state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the court from which they are taken, is to the effect that the state court judgment has the same preclusive effect in federal court that the judgment would have in that particular state court.

The plaintiffs in this case could have amended their state court pleadings to allege specifically a 42 U.S.C. Sec. 1983 civil rights action; however, under the *Migra* decision it makes no difference whether they amended or not or actually litigated the federal due process issues. The facts are that plaintiffs could have raised their federal issues in the state court proceedings (see *Brown v. DeLayo,* 498 F.2d 1173 (1974 10th Cir.)). If plaintiffs raised the federal issues in state court they are precluded from relitigating those issues in federal court, and, under *Migra* if they did not raise those federal due process issues in state court but could have they are precluded from bringing them in federal court. As in *Migra,* plaintiffs here could have obtained a federal forum for their federal claim by litigating it first in federal court. Plaintiffs chose however not to do that. Plaintiffs elected to pursue their state court action for damages for alleged due process deprivations clear through the appellate processes in the courts of the State of Arizona. Absent *certiorari* review in the United States Supreme Court, and none was sought in this case, the state decision is final and conclusive because only the

Supreme Court may review a state court decision as to due process constitutional rights. Such a prior state court adjudication of the federal constitution rights bars a subsequent federal action seeking vindication of the same right and this is so even if the federal action is brought under 42 U.S.C. Sec. 1983 (see *Brown v. DeLayo* cited supra).

Again under *Migra* whether the plaintiffs tried their federal due process issues or not in state court makes no difference since they "could have raised those issues".

Also, even if in the opinion of the fedeal court these federal constitutional due process issues were decided erroneously makes no difference because under *Migra* the federal court is to apply the state's preclusion law which in Arizona is to the effect that even if there is an erroneous decision the Arizona court is entitled to have its decision honored under the doctrine of *res judicata* (see *Fraternal Order of Police, Lodge 2 v. The Superior Court.* 596 P.2d 701, 122 Ariz. 653 (1979)). The federal courts also recognize the proposition that a judgment which is alleged to be wrong, but unreversed, is as effective as a judgment which is right. *Paull v. Archer-Daniels-Midland Co.*, 313 F.2d 612, (1963, CA Ark.); *Mitchell v. National Broadcasting Co.*, 553 F.2d 265, (2nd Cir. 1977).

Defendants AWC now argue that plaintiffs are defeated by the decision in the *Migra* case whether or not plaintiffs pursued the due process issue in the state courts because the state court judgment has the same claim preclusive effect in federal court that the judgment would have in the Arizona state courts and that pursuant to *Migra* the Supreme Court should order the Ninth Circuit to remand the case to the federal district court for interpretation and application of the Arizona state preclusion laws.

CONCLUSION

The U.S. Ninth Circuit Court's memorandum decision that is sought to be reviewed by *certiorari* is not a final one, a fact that in many cases alone is sufficient basis for a denial of the petition; however, there is a dire conflict between the decisions of the state courts of Arizona and the U.S. Ninth Circuit Court of Appeals. Because the conflict is clear, this raises a greater ire with not only the people concerned but the public and even the judiciary that observe it. In such circumstances the parties should not be unduly burdened, time and expense-wise, with the hope that the system will someday mercifully apply justice to the procedures *(Hamilton-Brown Shoe Co v. Wolf Bros. Inc., Co.,* 240 U.S. 251 (1916)).

On *certiorari* to review judgments of circuits courts of appeal reversing judgments of the federal district courts and remanding the case, the Supreme Court may either proceed to a complete decision or deal only with the matter considered by the circuit court of appeals and remand the case to that court for any needed action on other questions. See *Cole v. Ralph,* 252 U.S. 286 (1920). In the *Cole* case the United State Supreme Court decided a matter because the litigation had covered a considerable period of time. Defendants AWC would request the Supreme Court to consider AWC's plea for immediate intervention because of the fact that this case has been pending for over seven years.

In view of the foregoing facts and reasons for review, it is respectfully requested that a Writ of Certiorari issue to review the memorandum decision of the U.S. Ninth Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
DEC 23 1983
PHILLIP B. WHERRY
CLERK, U.S. COURT OF APPEALS

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILLIP STANLEY, *Plaintiffs-Appellants,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTIN HAYDIS and JOHN A. CURRIE, *Defendants-Appellees.*	No. 83-1794 D.C. # CV-77-168-WEC **MEMORANDUM***

Appeal from the United States District Court
for the District of Arizona
Walter E. Craig, District Judge, Presiding
Argued and submitted November 15, 1983

Before: GOODWIN, SCHROEDER, and FARRIS, Circuit Judges.

In this action under 42 U.S.C. § 1983, plaintiffs, former staff and faculty members at Arizona Western College (AWC), claim that the defendants' refusal to renew their contracts deprived them of property rights in their employment without due process of law. They argue that under the faculty handbook, promulgated under state law, the board could refuse contract

renewal only for cause, and that plaintiffs were entitled to greater procedural safeguards than AWC was willing to provide. The district court granted AWC's motion for summary judgment on the basis that plaintiffs had failed to exhaust their administrative remedies because they had not accepted the hearing offered by the Board.

Exhaustion is not required. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557 (1982). The district court did not apply *Patsy* because in its view the administrative remedy which was offered was the very procedure for which plaintiffs had asked. The hearing that AWC offered, however, would have excluded consideration of the issue of cause, and made no reference to other procedural entitlements claimed by plaintiffs. There are at the very least genuine issues of fact concerning the nature of plaintiffs' property interests in their employment, the correlative procedural protections to which they were entitled and the extent to which the Board's offer of hearing satisfied them.

We therefore reverse the summary judgment and remand to the district court for consideration of these issues, which were not encompased within any state court litigation between these parties.

Reversed and remanded.

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DR. RALPH MOOREHEAD; DR. PHILLIP STANLEY; DR. JOHN COOPER; DR. JIM R. PELL; RONALD COSTIN; DR. ROBERT J. GARCIA; and JOE L. KING, *Plaintiffs-Appellants,* v. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD; CHARLES McCONNELL; WALTER KAMMANN; HAROLD R. ANDERSON; AUSTEN HAYDIS; and JOHN A. CURRIE, *Defendants-Appellees.*	)	1 CA-CIV 6771 DEPARTMENT D YUMA County Superior Court Nos. 41044, 41045, 41046, 41047, 41049, 41050, 41051, and 41565 (consolidated) **ORDER**

The above entitled matter was duly submitted to the Court. The Court has this day rendered its memorandum decision.

IT IS ORDERED that the memorandum decision be filed by the Clark.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the memorandum decision, be sent to each party appearing herein or to the attorney for such party, and to the Honorable Douglas W. Keddie, Judge.

DATED this 13th day of September, 1983.

s/ LEVI RAY HAIRE

LEVI RAY HAIRE, PRESIDING JUDGE
DEPARTMENT D

The foregoing directives were complied with on September 13, 1983, by mailing the required to:

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41046, 41047, 41049, 41050,
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The Honorable Douglas W. Keddie, Judge
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GLEN D. CLARK, CLERK
By

s/ GLEN D. CLARK

Chief Deputy Clerk

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DR. RALPH MOOREHEAD; DR. PHILLIP STANLEY; DR. JOHN COOPER; DR. JIM R. PELL; RONALD COSTIN; DR. ROBERT J. GARCIA; and JOE L. KING, *Plaintiffs-Appellants,* v. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD; CHARLES McCONNELL; WALTER KAMMANN; HAROLD R. ANDERSON; AUSTEN HAYDIS; and JOHN A. CURRIE, *Defendants-Appellees.*	1 CA-CIV 6771 DEPARTMENT D MEMORANDUM DECISION (Not for Publication; Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Yuma County
Cause Nos. 41044, 41045, 41046, 41047, 41049, 41050, 41051 and 41565 (Consolidated)
The Honorable Douglas W. Keddie, Judge

AFFIRMED

Winston & Stawn
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Ellen J. Waxman
Arthur P. Greenfield
Attorneys for Plaintiffs-Appellants Phoenix, Arizona

Hunt, Stanley, Hossler & Rourke, Ltd.
By: Douglas S. Stanley
Attorneys for Defendants-Appellees
Yuma, Arizona

HAIRE, Presiding Judge

This appeal involves the propriety of a summary judgment entered in favor of the Arizona Western College District Governing Board (Board) and individual Board members in litigation arising from the Board's decision not to renew the appellants' contracts of employment as faculty members of Arizona Western College. The following facts gave rise to this litigation.

After receiving notification of non-renewal of their contracts in January 1977, appellants retained counsel who sent a letter to the Board dated January 28, 1977, indicating that appellants believed that the non-renewal decisions were improper. Appellants' counsel also requested certain procedures including a hearing to review the decisions. Counsel for the Board did not receive this letter until February 8. He then responded to appellants in a letter dated March 3, 1977, which offered a hearing based on guidelines differing from the procedures outlined by appellants in their request. Appellants did not respond to this offer, and no hearings were held.

In September 1978, appellants filed these consolidated actions seeking damages for breach of contract and wrongful termination. The trial court granted the Board's motion for summary judgment on the ground that appellants had failed to exhaust their administrative remedies, and this appeal followed. Additional facts will be incorporated in the discussion of the arguments presented by appellants.

Appellants first contend that they exhausted available administrative remedies by requesting a hearing in the January 28 letter because the hearing offered by the Board did not comply with either the Faculty Handbook or with requirements of due process. We disagree.

Requirements of due process when a teacher's contract is terminated include notice of the charges, notice of the evidence on which the charges are based, a hearing before an impartial tribunal, and the opportunity to present witnesses and confront adverse evidence at the hearing. *See McClanahan v. Cochise College,* 25 Ariz. App. 13, 18, 540 P.2d 744, 749 (1975). The March 3 letter offered appellants a hearing before the Board at which appellants could appear and submit evidence. Prior to the hearing, appellants would be provided with grounds for the Board's action.

Appellants had requested access to documents and records of Arizona Western College and the Board pertaining to the Board's actions, as well as a statement of charges and a summary of witnesses and evidence used to substantiate these charges. Counsel's letter indicates that these requests presented "some difficulties" and continued as follows:

> "We are not aware of any authority for the proposition that these employees should have unlimited access to the records of the college; and this fact, coupled with the disruption that would result from allowing such access, would probably lead us to advise the Board to deny your request unless you can show us some authority for your position. Also, since your letter indicates that you have already concluded that the actions of the Board were not in accord with the applicable legislation, policies, procedures and the like in effect at the college,

we presume that you have already had an opportunity to review the relevant authoritative documents. However, if there is anything futher you would like to see, please let us know.

"None of your clients were terminated for cause and, as a result, we had not intended to produce any list of charges against them as we do not think it would be proper to proceed with this case as though your clients had been dismissed. As indicated above, we believe that contract nonrenewal does not require an adversarial hearing where the Board has a burden of establishing cause for termination. This being the case, we do not see why dismissal issues should be interjected into the case. If we are not interpreting this part of your request correctly, please advise."

Thus, although counsel for the Board initially refused these specific requests, the March 3 letter stated reasons for the refusal and more importantly invited appellants to respond with further clarification and support for their position. The letter continued:

"The guidelines we have outlined in this letter differ significantly from the guidelines you requested in your letter; and since we want to insure that your clients' rights are adequately protected, we would like to resolve as many of these differences as we can prior to actually setting any cases for hearing. Thus, if your research discloses any cases, statutes or other authority which would indicate that the procedure we have outlined above is inadequate or otherwise inappropriate, we will be most pleased to receive the same so that we could

> review our position. Likewise, if you are interested in any of the authorities supporting our view of how the matter should proceed, we would be most pleased to supply the same. After this exchange of views, perhaps we will develop some common ground upon which to proceed."

The above portion illustrates the Board's willingness to resolve the differences over procedures to be followed in satisfying appellants' request for a hearing. In view of this expressed desire to cooperate with appellants, we cannot say that pursuit of a hearing would have been futile and that the hearing offered by the Board would not have provided an adequate remedy. We note that the Board had conducted hearings in the past after which employees had been reinstated.

Futhermore, if appellants believed that the Board's responses to further discussions about hearing procedures were inadequate, appellants could have brought a special action to compel the Board to comply with the Faculty Handbook or other requirements of due process.

Appellants point out that their January 28 letter requesting a hearing also requested a response from the Board within ten days. Appellants argue that after waiting more than one month without receiving any response, they justifiably believed that the Board was not going to provide a hearing and that their only recourse was to institute litigation. We note that appellants inadvertently failed to include counsel for the Board on the original mailing of the January 28 letter. Consequently, counsel for the Board did not receive appellants' letter requesting a hearing until February 8. On March 3, counsel sent a letter to appellants offering a hearing. In view of appellants' oversight and the

numerous issues raised by appellants' letter, we do not find that the period between appellants' January 28 request and the Board's March 3 response constituted an unreasonable delay.

Appellants also maintain that exhaustion of administrative remedies was not necessary because an appeal to the Board was a permissive remedy. *See Univar Corp. v. City of Phoenix,* 122 Ariz. 220, 224, 594 P.2d 86, 90 (1979). They cite the Faculty Handbook which provides: "If the faculty member believes the non-renewal is unjustified, he *may* appeal directly to the District Governing Board with or without the aid of legal counsel." (Emphasis added). A statement to the same effect was read into the minutes of the Board meeting at which the non-renewal decisions were affirmed: "Requests for a hearing by any of those persons above named before the Governing Board *may* be submitted within a reasonable length of time." (Emphasis added).

This court has prviously held that use of the word "may" creates an option only in the sense that a party may decide not to pursue any further review of an administrative decision. However, the "optional" hearing is a prerequisite if a party intends to seek Judicial Review. *See Arizona Law Enforcement Merit System Council v. Dunn,* 133 Ariz. 429, 433, 652 P.2d 168, 172 (App. 1982). We are aware that the court in *Merit System* relied upon language in the Administrative Review Act, specifically in A.R.S. § 12-902(B), to find that an aggrieved party must file for a hearing if available before seeking judicial review. We also recognize that the Administrtive Review Act, A.R.S. §§ 12-901 through 12-914, does not apply to decisions of the district governing board of a community college. *See McClanahan, supra,* 15 Ariz. App. at 15-17, 540 P.2d at 746-48.

Nevertheless, we believe that the rationale for making

an administrative hearing a prerequisite for judicial review applies in this situation. Such a hearing affords the administrative agency "the first opportunity to correct its own mistakes, thereby eliminating or minimizing subsequent appeals and relitigation." *Merit System, supra,* 133 Ariz. at 432, 652 P.2d at 171 (quoting *Herzberg v. David,* 27 Ariz. App. 418, 419, 555 P.2d 677, 678 (1976)). *See also Farmers Investment Co. v. Arizona State Land Department,* 1-CA-CIV 5461 (Supplemental Opinion, filed Apr. 21, 1983) ("[T]he basic purpose of the exhaustion doctrine is to 'allow an administrative agency to perform functions within its special competence — to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.' ") (quoting *Parisi v. Davidson,* 405 U.S. 34, 37, 92 S.Ct. 815, 818, 31 L.Ed.2d 17, 25 (1972).

Appellants also argue that the Board treated the hearing as a permissive remedy. On March 1, just before the Board's March 3 letter to appellants indicating its willingness to hold a hearing, appellants filed actions against the Board in state court, claiming that a violation of the open meeting laws nullified the non-renewal decisions, and in federal court, seeking an order to compel the Board to conduct a hearing under the same procedural guidelines appellants had previously requested. When appellants did not respond to the Board's March 3 letter offering a hearing, the Board sent a letter dated May 6, 1977, which stated:

> "To date, we still haven't had any written reply from you to our letter of March 3, 1977 concerning your eight clients at Arizona Western College. You may recall that in our letter of March 3, we went over the requests that were contained in your letter of January 28, 1977 and tried to establish a little common ground upon which the hearings you requested

might be conducted.

> "Since you have now commenced litigation against our clients, the District Governing Board in both the State Court and the Federal District Court for the District of Arizona, raising issues not only as to the requirements for hearings on behalf of your clients, but also as to the applicable procedures to be followed at these hearings, *we have assumed that you are content with the status of the record and we therefore are not planning on going any further with arrangements for the hearings, pending the outcome of your litigation.* If this presents any problem for you, please let us know."
> (Emphasis added).

Appellants argue that this language indicates an agreement between the parties to proceed with the litigation rather than a hearing.

Appellants misconstrue this language, however. The litigation referred to is not the underlying action in this appeal, seeking damages resulting from the alleged breach of contract and wrongful termination. Appellants did not file the damage action until September 1978, more than one year later. Rather, the May 6 letter reveals that counsel for the Board believed that the Board could suspend any plans for a hearing because the issues of whether such a hearing was required and how it should proceed would be resolved in the suits pending in state and federal court. Contrary to appellants' assertion, the Board did not agree that a hearing was totally permissive and that appellants could immediately seek judicial review by pursuing this damage action. We therefore conclude that the appeal to the Board was not a permissive remedy, but rather was a prerequisite to appellants' seeking judicial review

review of the Board's decisions not to renew their contracts.

Finally, appellants content that the ostensible violation of open meeting laws excused any failure to exhaust administrative remedies. Initially, the trial court found that the Board's actions violated the open meeting laws thus nullifying the non-renewal decisions. On appeal, this court reversed the judgment of the trial court and remanded the matter to determine whether the Board intended to re-approve and adopt its non-renewal decisions at a later meeting held in compliance with the open meeting laws thus validating the Board's action. *See Cooper v. Arizona Western College District Governing Board,* 125 Ariz. 463, 610 P.2d 465 (App. 1980). On remand, in 1981 the trial court found that the Board had reaffirmed the non-renewal decisions.

Appellants content that they could not have been required to appeal to the Board what initially appeared to them to be a void decision. They argue that it would be inequitable to now find that they should have appealed the non-renewal decisions when the issue of the open meeting laws violation was not resolved until more than four years later after an appeal and remand. This contention is without merit.

Appellants made a tactical decision to challenge the Board's action by alleging that the Board had violated the open meeting laws, rather than by participating in the hearing offered by the Board. The trial court initially found a violation in February 1978 from which the Board promptly appealed. Consequently, appellants were aware of the possibility of a reversal on the open meeting question long before they filed the damage actions in September 1978.

Furthermore, appellants pursued different remedies in the two actions. Had they prevailed on the open

meeting laws question, the non-renewal decisions would have been void and appellants would have been reinstated. Had they prevailed on the actions alleging breach of contract and wrongful termination, appellants would have been awarded damages. The fact that the open meeting action was pending on appeal does not excuse appellants' failure to exhaust administrtive remedies available to review the propriety of the non-renewal decisions and determine appropriate damages.

In summary, we agree with the trial court's finding that appellants failed to exhaust their administrative remedies. Long before this particular litigation was commenced, the appellants had received clear notification from the Board's counsel that the Board was willing to give appellants an appropriate hearing comporting with any applicable due process requirements. Consequently, the court correctly determined that by reason of their failure to proceed with a hearing appellants were precluded from seeking judicial review of the Board's non-renewal decision. We affirm the summary judgment granted by the trial court.

s/ LEVI RAY HAIRE
LEVI RAY HAIRE, PRESIDING JUDGE
DEPARTMENT D

CONCURRING:

s/ WILLIAM E. EUBANK
WILLIAM E. EUBANK, JUDGE

s/ BRUCE E. MEYERSON
BRUCE E. MEYERSON, JUDGE

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YUMA

DR. RALPH MOOREHEAD, *Plaintiff,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, *Defendant.*	NO. 41044
DR. PHILLIP STANLEY, *Plaintiff,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, *Defendant.*	NO. 41045
DR. JOHN COOPER, *Plaintiff,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, *Defendant.*	NO. 41046

DR. JIM R. PELL, *Plaintiff,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, *Defendant.*	NO. 41047
RONALD COSTIN, *Plaintiff,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD *Defendant.*	NO. 41049
DR. ROBERT J. GARCIA, *Plaintiff,* vs. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, *Defendant.*	NO. 41050

JOE L. KING,

Plaintiff,

vs.

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD

Defendant.

NO. 41051

NORTH RIVER INSURANCE COMPANY

Plaintiff,

vs

CHARLES McCONNELL, et al,

Involuntary Plaintiffs,

vs.

ROLLE, JONES, BENTON & COLE et al,

Defendants.

NO. 41565

ORDER

The motions of the defendant Arizona Western College District Governing Board and its individual members for partial summary judgment, in limine and for summary judgment were taken under advisement

on February 22, 1982 following oral argument.

This court finds that there is no genuine issue concerning these material facts:

1. Each of the plaintiffs was notified by letter dated January 12, 1977 that the District Governing Board had determined he would not be tendered a contract with Arizona Western College for the "ensuing 1977-78 school year".

   a. Each letter was signed by defendant Charles F. McConnell as Chairman of the Arizona Western College District Governing Board.

   b. Each letter stated that the action was taken after review of the plaintiff's past performance and upon the basis that "the best interest of the students, faculty and the institution would be served by this termination".

   c. The letter advised each plaintiff that he might "appeal this decision to the District Board pursuant to the procedures set forth in the Arizona Western College Faculty Handbook 1975-76."

2. By letter to Charles F. McConnell as Chairman of the defendant board, dated January 28, 1977, counsel for the plaintiffs requested a hearing before an impartial hearing tribunal "at a time and place mutually convenient to the District Governing Board, the faculty member involved, and counsel for the faculty member involved." The letter also stated the position of the plaintiffs that the defendant Board would not constitute an impartial hearing tribunal since it apparently had made the initial determination in question. In the letter plaintiffs' counsel made various requests for information to be furnished by the defendant Board before the hearing and for certain procedures to be followed at the hearing.

3. A copy of the January 28, 1977 letter was not mailed to counsel for the Board by plaintiffs' counsel until February 7, 1977, the omission of the Board's attorney from the earlier mailing being due to inadvertance. The attorneys for the Board first learned of and received the letter of January 28, 1977 on February 8, 1977.

4. No further communication occurred between the parties' counsel between February 8, 1977 and March 3, 1977.

5. On March 1, 1977 the plaintiffs filed special action numbered 38653 in this court, naming the defendants here as the defendants there. In that action:

a. Plaintiffs alleged the defendants made final decisions in various executive sessions at a meeting convened on or about January 11, 1977, that the plaintiffs' employments contracts for the academic year 1977-1978 would not be renewed.

b. Plaintiffs sought judgment declaring all actions not to renew plaintiffs' contracts, taken by the Board on January 11, 1977 and on January 12, 1977, null and void as well as subsequent actions taken January 18, 1977. They further sought to have the Board enjoined from taking any further actions respecting the administration of the college except at meetings for which notice is given pursuant to § 38-431.02, i.e., the "open meeting law".

c. Each of the defendants was served with process on March 10, 1977.

6. A letter to the plaintiffs from their attorneys dated March 3, 1977 notified plaintiffs that "after waiting over a month without any response from the District Governing Board to our earlier letter requesting a hearing . . . we decided to institute litigation against the District

Governing Board on behalf of all of you. We have filed two suits, one in the United States District Court for the District of Arizona, in Phoenix, and one in Yuma County Superior Court . . ." That letter further stated that "the suit in Federal Court contends that each of you had *de facto* tenure at Arizona Western College and that the Board's failure to give you a hearing on the issue of the renewal of your contracts deprived you of your constitutional right to due process of law."

7. The parties agree that an action was instituted in the United States District Court as plaintiffs' attorneys described in the March 3, 1977 letter to their clients. Its present status is not a matter of record here.

8. On March 3, 1977, without knowledge that either the special action had been previously filed against the defendants by plaintiffs in this court or that an action had been filed by plaintiffs against the defendants in United States District Court, the attorneys for the defendants responded on the January 28, 1977 letter. Defendants' attorneys' letter of March 3, 1977 to the attorneys for the plaintiffs noted there were "a few procedural differences that should be resolved before any hearings are actually scheduled", and went on to note that there were eight different individuals involved, questioned whether plaintiffs' counsel desired eight different hearings or one large hearing, suggested the hearing could be conducted after the close of the school year but before the commencement of the new term, stated the belief of the attorneys for defendants that the hearing must be conducted before the Board, and addressed other procedural matters raised in the letter of January 28, 1977.

9. By letter dated May 6, 1977 defendants' attorneys noted to plaintiffs' attorneys that no response had been received to the defendants' attorneys' letter of March 3, 1977 concerning the hearings. The letter further noted

"Since you have now commenced litigation against our clients . . . in both the State Court and the Federal District Court . . . raising issues not only as to the requirement for hearings on behalf of your clients, but also as to the applicable procedures to be followed at these hearings, we have assumed you are content with the status of the record and we therefore are not planning on going any further with arrangements for the hearings, pending the outcome of your litigation . . .

10. On February 3, 1978 this court entered an order for partial summary judgment in favor of the plaintiffs in special action numbered 38653, holding the action of the Board on January 11, 1977, pertaining to the termination of or decision or notice not to renew the contracts of the plaintiffs, null and void and of no force or effect. That order also found any action taken in the special meeting of the Board of January 12, 1977 null and void. In addition the judge presiding in that case ruled any action taken by the Board on January 18, 1977 relating to its decision not to renew or to terminate the contracts of the plaintiffs had no validity since it simply referred to prior actions and did not comply with the open meeting statute. Judgment in accordance with that order was entered February 22, 1978.

11. These actions were instituted September 5, 1978, each alleging in part:

> a. The Board decided in executive sessions on January 11, 1977 not to renew the plaintiffs' employment contracts for the 1977-78 academic year, that such action was purported to be taken again on January 12, 1977, and that the plaintiffs were notified of the Board's decision by the letter of January 12, 1977, which letter failed to specify the reasons for the decisions not to renew.

b. The actions of the Board not to renew the plaintiffs' contracts were declared null and void by the judgment of this court on February 22, 1978.

c. The Board has promulgated the Arizona Western College Faculty Handbook which provides procedures for the processing and handling of faculty grievances and for implementation of any decision affecting the employment status of faculty members, including non-renewal of teacher contracts.

d. None of the plaintiffs had been apprised of the reasons for the decision not to renew his contract.

e. The decision not to renew having been declared null and void, the contracts of the plaintiffs have been automatically renewed.

12. The February 22, 1978 decision in special action no. 38653 was appealed, and on May 8, 1980, the decision of the Court of Appeals became final in which it reversed the decision of this court and remanded that case for trial. That trial was held and on November 12, 1981, judgment was entered in favor of defendants, holding the meetings of the defendant Board on January 11, 1977, and January 12, 1977, were void but that on January 18, 1977, the non-renewal of the plaintiffs' contracts was again considered and the Board had the authority to adopt by reference its actions in the meetings of January 11 and 12 not to renew the contracts of the plaintiffs, and it passed a resolution to that effect.

13. There is an Arizona Western College Faculty Handbook 1975-76 in which the subjects of "due process" and "non-renewal" are treated.

a. At page 19 of the handbook, under the title "DUE PROCESS PROCEDURE" it is stated that "(Due process Procedures are covered independently under the topics of Suspension, Dismissal, Non-renewal, and Demotion.)"

b. At page 21 of the handbook, under the respective titles "Non-Renewal Procedure" and "Dismissal Procedure", it is provided that a faculty member believing either non-renewal or dismissal unjustified may "appeal directly to the District Governing Board with or without the aid of legal counsel". Further procedures for the appeal process are not specified in the handbook.

c. The "Non-Renewal Procedure" (page 21 of the handbook) states under "Cause" that a faculty member's contract may not be renewed for, among others, ". . . reasons which are against the best interest of students, the faculty member, or the institution", and, under "Procedure" it provides the faculty member will be notified in writing, which notification ". . . will include the reasons for non-renewal." Similar statements appear under "Dismissal Procedure".

14. All the parties recognize the handbook as having been in force at the time of the actions of the Board concerning the plaintiffs in January, 1977.

15. The letter of January 12, 1977 to each plaintiff failed to comply with the requirement of the handbook that "reasons for non-renewal" or "reasons for dismissal" be stated in the notification thereof.

CONCLUSIONS

When this action was instituted, the plaintiffs relied on the ruling of this court in case numbered 38653 that the actions of the Board taken concerning the plaintiffs in January, 1977 were void. The plaintiffs elected to pursue that theory when they filed that action on March 1, 1977. Apart from their federal action, the plaintiffs elected not to pursue an appeal to the Board by instituting the special action numbered 38653. If, indeed, the Board's actions were void, it could be argued with some force that to appeal a void decision to the body that rendered it would be unnecessary. Whether that argument is valid need not be considered, however, for the final judgment in no. 38653 was that the Board's actions were not void.

The faculty handbook specifically afforded the plaintiffs the right to appeal within the college system, i.e., to the Board. That remedy having been available, the plaintiffs should have exhausted it before seeking to recover damages in this court. *Kaufman v. Pima Junior College Governing Board,* 14 Ariz. App. 475. 478, 484 P.2d 244 (1971). Despite the fact that the Board had made the questioned decision as to each plaintiff, it did not thereby become disqualified to conduct hearings before which the plaintiffs could have appeared. See *McClanahan v. Cochise College,* 25 Ariz. App. 13, 18, 540 P.2d 744 (1975). In *Kaufman* the court stated the district board is given the authority to use and exercise its judgment, meaning the exercise of discretion, not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law. The full opportunity to exercise that discretion would haave required that the plaintiffs give the Board the opportunity, through the appeal process, to correct errors the plaintiffs contended the Board made in its decisions.

Necessarily the appeal process could only be initiated by the plaintiffs.

This court has no difficulty in concluding that as a matter of law the Board did not unreasonably delay in responding through its attorney to the request of the plaintiffs' attorney for a hearing or hearings. Numerous problems were noted by plaintiffs' counsel that had to be addressed before any hearings could be scheduled. But it is not necessary that there now be a ruling that there was no unreasonable delay. had the plaintiffs wished to pursue hearings and if the date of the response of the Board or its content could be construed as a refusal to participate in hearings, plaintiffs could have sought by special action to compel the hearings to be held.

The fact that the Board failed to speciy reaons for its decision not to renew the contracts of each of the plaintiffs cannot justify the plaintiffs' failure to appeal to the Board. The letter of the Board's attorney dated March 3, 1977 stated the plaintiffs would be provided with the grounds for the Board's action before the hearing. However, if that response was not sufficient, plaintiffs had a remedy available in the form of a special action to force the Board to comply with the handbook or to take any other procedural steps which would satisfy any requirements of due process.

Although the second count sounds in tort, it is, of course, founded on the same actions as the first count which alleges breach of contract. The obligation of the plaintiffs to pursue their administrative remedies is equally applicable to court two.

This court concludes there is no genuine issue of material fact concerning the failure of the plaintiffs to exhaust their administrative remedies before seeking judicial review of the actions of the defendants, and

the defendants are entitled to summary judgment dismissing both counts as to each of them. Therefore, it is ORDERED that summary judgment be entered in favor of the defendants and against the plaintiffs on the complaint.

DATED this 28th day of April, 1982.

s/ DOUGLAS W. KEDDIE
DOUGLAS W. KEDDIE
JUDGE OF THE SUPERIOR COURT

Copies of the foregoing mailed
April 28, 1982, to:

Arthur P. Greenfield
Daniel McAuliffe
Richard S. Plattner
Charles D. Roush

and placed in the boxes of:

Douglas Stanley
David Ellsworth

C.C. NEWMAN, Clerk of the Superior Court

By s/ KENDRA REESE
Deputy Clerk

42 U.S.C. § 1983.
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1738.
State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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No. 83-1879

In The

Supreme Court of the United States

October Term, 1983

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS and JOHN CURRIE, constituting the members thereof,

Petitioners,

vs.

JOHN F. COOPER, RONALD COSTIN, ROBERT J. GARCIA, JOE L. KING, RALPH MOOREHEAD, JIM R. PELL, ROBERTA PURDY and PHILIP STANLEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 83-1879

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This litigation arose out of decisions by the District Governing Board of Arizona Western College (hereinafter referred to as the "Board") to terminate the re-

spondents' employment as faculty and administrative staff members at Arizona Western College in meetings held on January 11, 12 and 18 of 1977. Respondents notified petitioners by letter dated January 28, 1977 that they believed the termination and non-renewal decisions were improper and unjustified because the Board failed to comply with the procedures set forth in the Arizona Western College faculty handbook and there was no showing of "cause" justifying the non-renewal decisions as required by the handbook.

Respondents' protestations went unanswered, and on March 1, 1977, they filed two lawsuits against the Board and its individual members. One was a special action[1] filed in the Arizona Superior Court, Yuma County, Cause No. 38653, in which respondents sought a declaration that the non-renewal decisions were made in violation of the Arizona open meeting laws. The second action was the present action filed in the United States District Court for the District of Arizona.

Respondents initiated the present action by filing a complaint pursuant to 42 U.S.C. § 1983, seeking damages and reinstatement for the wrongful non-renewal of their employment contracts as faculty and administrative staff members at Arizona Western College. Respondents also sought an order from the court directing petitioners to grant them a full and fair hearing to challenge any allegations of cause justifying the non-renewal decisions.

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[1]Special action procedure is provided for in Arizona pursuant to rules found at Vol. 17A, Arizona Revised Statutes. Rule 1 of the Rules of Procedure for Special Actions describes the relief available as being that previously obtained by the writs of certiorari, mandamus or prohibition. (*Id.*)

Respondents then initiated discovery in both the Arizona open meeting law action and the action filed pursuant to 42 U.S.C. § 1983 in the United States District Court. On the basis of the discovery conducted by respondents, respondents filed a motion for summary judgment in the Arizona open meeting law action in August of 1977. That motion was granted on February 2, 1978. In finding for respondents, the Arizona Superior Court ruled that the action taken by the Board was in violation of the Arizona open meeting laws, and, therefore, the non-renewal decisions were null and void. In the absence of a valid non-renewal decision, the respondents' employment contracts were automatically renewed. Thus, the ruling in the open meeting law action had the effect of reinstating respondents to their prior positions at Arizona Western College and entitling them to back pay. In order to obtain the back pay, respondents, with the exception of Roberta Purdy, filed new damage actions in the Arizona Superior Court for Yuma County on contract and tort theories in March, 1978.

Petitioners appealed the Superior Court's ruling in the open meeting law action, and the Yuma County Superior Court held the state damage actions in abeyance pending a ruling from the Arizona Court of Apeals. The appeal also made it necessary to hold the federal action in abeyance in order to preserve the respondents' right to seek redress for deprivations of their constitutional rights if the ruling in the open meeting law action was reversed.

On March 4, 1980, the Arizona Court of Appeals reversed the trial court's ruling in the open meeting law action and remanded the case for trial. *Cooper v. Arizona Western College District Governing Board,* 125 Ariz.

463, 610 P.2d 465 (1980). A trial was held in July, 1981, which resulted in a judgment in favor of petitioners. In April, 1982, the Yuma County Superior Court granted judgment in favor of petitioners in the state damage action on the sole ground that respondents failed to exhaust their administrative remedies. It then became necessary for the respondents to look to the federal court action for redress of the deprivation of their due process rights.

On November 18, 1982, petitioners filed a motion to dismiss, or, in the alternative, a motion for summary judgment alleging that they were entitled to judgment in their favor under theories of *res judicata,* abandonment by respondents of the litigation, failure to exhaust administrative remedies, the abstention doctrine, absence of constitutional due process violations, and the affirmative defense of good faith. The United States District Court granted petitioners' motion for summary judgment on the basis that respondents had failed to exhaust their administrative remedies because they had not accepted the hearing offered by the Board. Petitioners' Appendix at A-2.

Respondents appealed the District Court order to the United States Court of Appeals for the Ninth Circuit. On December 23, 1983, the Court of Appeals issued its memorandum opinion reversing the District Court decision and remanding for further proceedings in the District Court. The Court of Appeals ruled that exhaustion of administrative remedies was not required, citing *Patsy v. Board of Regents,* 457 U.S. 496 (1982). The Ninth Circuit also ruled as follows:

> There are at the very least genuine issues of fact concerning the nature of plaintiffs' property interests in

their employment, the correlative procedural protections to which they were entitled and the extent to which the Board's offer of hearing satisfied them.

Memorandum opinion at 2; Petitioners' Appendix at A-2.

Petitioners have now filed a petition for a writ of certiorari seeking review of the memorandum opinion of the Ninth Circuit Court of Appeals.

———o———

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because a final judgment or decree has not been entered. It is well established that a writ of certiorari should issue only after a final judgment or decree. In the present action, the Ninth Circuit held there were unresolved issues of fact precluding summary judgment. Thus, there has not been a final decree or judgment from the courts below, and the petition for writ of certiorari should be denied.

From a substantive standpoint, the petition for writ of certiorari should also be denied. The Ninth Circuit correctly held that respondents were not required to exhaust state administrative remedies before initiating and pursuing an action filed pursuant to 42 U.S.C. § 1983 in federal court, relying upon the clear authority of *Patsy v. Board of Regents,* 457 U.S. 496 (1982). The Ninth Circuit then properly remanded for trial on the merits the issues concerning the nature of respondents' property interests in their employment and the related procedural and substantive matters.

Petitioners' reliance on *Migra v. Warren City School District Board of Education,* — U.S. —, 76 L.Ed.2d 56

(1984) is also misplaced. The facts of the present action are entirely different from those before the Court in *Migra v. Warren City School District Board of Education.* Respondents' § 1983 action was filed before the state court actions were filed. In addition, *there was not a trial on the merits in the state court damage actions.* Therefore, the Ninth Circuit Court of Appeals correctly rejected petitioners' arguments based on *Migra v. Warren City School District Board of Education.*

ARGUMENT

I. The Petition For Writ Of Certiorari Is Premature.

It is well established that a writ of certiorari should issue only after a final decree. *John Simmons Company v. Grier Brothers Company,* 258 U.S. 82 (1922); *Hamilton-Brown Shoe Company v. Wolf Brothers & Company,* 240 U.S. 251 (1915); *Panama Railroad Company v. Napier Shipping Company,* 166 U.S. 280 (1897). Indeed, the concept of "finality" has always been a leading principle in determining the availability of judicial review throughout the federal system.

The Court has held that for purposes of an appeal to the Supreme Court, "a decree is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *Heike v. United States,* 217 U.S. 423 (1909); *see also, Scofield v. National Labor Relations Board,* 394 U.S. 423 (1969) *Parr v. United States,* 351 U.S. 513 (1955).

In *Switzerland Cheese Association v. E. Horn's Market,* 85 U.S. 23 (1966), the Court held that where summary judgment is denied because of unresolved issues of fact, the order is not appealable. *Accord, United States v. Florian,* 312 U.S. 656 (1941). Although both *Switzerland Cheese Association* and *Florian* involve the question of whether a district court decree was "final" for purposes of appellate review, the principles relied upon by the Court should apply in the instant case.

In the present action, the Ninth Circuit determined that there were issues of fact that made the entry of summary judgment improper and remanded the action to the District Court for further proceedings. Petitioners' Appendix at A-2. Thus, the petition for writ of certiorari should be denied.

II. No Prior State Court Litigation Precluded Determination Of The Federal § 1983 Claim.

Petitioners appear to be arguing that the litigation in the state courts between petitioners and respondents precludes respondents from pursuing the present action. These are the same *res judicata* and collateral estoppel arguments that were rejected below.

In no state court action was there a consideration of the merits of respondents' claims. The *sole* basis for the trial court's decision in the state court damage actions was that respondents failed to exhaust their state administrative remedies. *This ruling* was affirmed by the Arizona Court of Appeals. Petitioners' brief at B-3. As the Court held in *Patsy v. Board of Regents,* 457 U.S. 496

(1982), exhaustion, of state administrative remedies is not a prerequisite to a § 1983 action in federal court. Thus, no state court action between petitioners and respondents operates to preclude the present action filed pursuant to § 1983.

The Ninth Circuit examined both of the state actions and concluded that the issues raised in the § 1983 action were not encompassed within any state court litigation between petitioners and respondents.

The recent decision by the Court in *Migra v. Warren City School District Board of Education,* — U.S. —, 79 L.Ed.2d 56 (1984), does not compel a different result. In *Migra,* the plaintiff brought suit in state court based upon breach of contract and tort theories. The state court action was tried on the merits to the court sitting without a jury, and judgment was rendered in favor of plaintiff. After the state court litigation was finally resolved, plaintiff instituted an action in the United States District Court pursuant to 42 U.S.C. § 1983 and § 1985. This Court held that the Ohio state law regarding claim preclusion applied to the § 1983 action and remanded the case to the District Court for further proceedings.

Here, the state action filed by the respondents was dismissed for failure to exhaust administrative remedies; therefore, there was never a consideration of the merits of respondents' claim. Respondents are not therefore precluded from pursuing the § 1983 action.

CONCLUSION

The Ninth Circuit summarily disposed of petitioners' argument in memorandum opinion form.[2] Petitioners' motion for rehearing and for rehearing en banc were disposed of with equal dispatch; the Ninth Circuit and this Court have denied petitioners' applications for stay of the mandate. No basis, grounds or reasons exist for granting the petition.

Respectfully submitted,

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[2]See Rule 21, Rules of the United States Court of Appeals for the Ninth Circuit.

83-1879

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In The

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October Term, 1983

ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD, CHARLES McCONNELL, WALTER KAMMANN, HAROLD ANDERSON, AUSTEN HAYDIS, and JOHN CURRIE, constituting the members thereof,

Petitioners,

vs.

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Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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2. The U.S. Ninth Circuit Court of Appeals committed obvious error when they reversed the Arizona Federal District Court and remanded the case ". . . *for consideration of these issues* [due process] *which were not encompassed* within any state court litigation between these parties", because said due process issues were obviously "encompassed" in the Arizona State Court litigation. 10

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REPLY BRIEF OF PETITIONER

ARGUMENT #1

Respondents (plaintiffs below) are barred under *Migra v. Warren City School District Board of Education*, ____U.S.,____, 76 L.Ed. 2nd 56 (1984) from litigating in the Federal Court 42 U.S.C. Sec. 1983 claims where respondent had an opportunity to raise those claims in a previous State Court proceeding in Arizona so that the Arizona State-Court Judgment has the same preclusive effect in Federal Court that the Judgment would have in the Arizona State Courts.

Long before the *Migra* decision the U.S. 9th Circuit Court of Appeals effectively applied the preclusion rule set up in *Migra* through the court's decision in *Scoggin v. Schrunk*, 522 F.2d 436 (CA 9, 1975). Plaintiffs now argue in their brief in opposition to the Petition for Writ of Certiorari that *Migra* and therefore *Scoggin* do not apply for two reasons: **one**, because this 42 U.S.C. Sec. 1983 action was filed before the state court damage actions were filed, and **two**, that *Migra* does not apply and does not compel a different result because in *Migra* the action was tried "on the merits" in the state court of Ohio sitting without a jury with judgment rendered in favor of the plaintiff while in this case there never was consideration of the merits of respondent's state court claim and therefore respondents are not precluded from pursuing their section 1983 action (respondent's brief, page 8).

It makes no difference whether this federal suit was filed first or the state court action first because the general law is that if two actions are pending at the same

time and a judgment in one becomes final it may be raised in bar of the other regardless of which action was begun first. See Restatement of Judgments Second, Section 14. Under general comments it is stated:

> *Nor is a judgment,* otherwise entitled to res judicata effect in a pending action, *to be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action.* It is merely required that rendition of the final judgment shall antedate its application as res judicata in the pending action. (Emphasis added)

This is also the law in the State of Arizona, see *Day v. Wiswall's Estate,* 341 P.2d 217, 98 Ariz. 400 (1963).

Additionally the fact that this case was decided at the state court level on a motion for summary judgment and not after a full blown trial before the court is not determinitive. See *Mitchell v. National Broadcasting Co.,* 553 F.2d 265 (CA 2nd, 1977) and see 1B Moore's Federal Practice, paragraph 0.409 [1], at 1005 (1974 and 1975 Supp.) (footnotes omitted), and cases cited therein. See *Hubicki v. ACF Industries, Inc.,* 484 F.2d 519, 524 (3d Cir. 1973) *(summary judgment is a final judgment on the merits sufficient to raise defense of res judicata in subsequent action between the parties);* citing numerous cases.

Also *involuntary dismissal* under the federal and Arizona Rules of Civil Procedure, Rule 41(b) "operates as an adjudication upon the merits."

Respondents/plaintiffs' argument that the state court judgment was not "on the merits" because it was either dismissed or rendered pursuant to a summary judgment is contrary to the law. The Sixth Circuit in *Olsen v. Muskegon Piston Ring,* 117 F.2d 163, (6 CA 1941) stated as follows:

> Appellants' contention that no judgment was rendered *on the merits* also is not tenable. *It is sufficient if the record shows that the parties might have had their controversies determined according to their respective rights if they had represented all their evidence and the court had applied the law.* Freeman on Judgments, 5th Ed., Vol. II. Sec. 723-725.

A summary judgment in Arizona,

> ". . . is conclusive as to every point decided therein, *and also as to every point raised by the record* [either explicitly or implicitly] *which could have been decided,* with respect to the parties or their privies . . ." (Emphasis added) See Day v. Wiswall cited supra and also see *El Paso Natural Gas Company v. State,* 599 F.2d 175, 123 Ariz. 219 (1979).

Arizona's recognition of the requirements of exhaustion of administrative remedies has been long settled. *Campbell v. Chatwin,* 102 Ariz. 251, 428 P.2d 108 (1967). Arizona courts also recognize that there are exceptions to that rule where the remedies are *futile* or *useless,* see *Town of Paradise Valley v. Gulf Leisure Corp.,* 27 Ariz. App. 600, 357 P.2d 532 (1976).

Respondents/plaintiffs in their state court action alleged at the trial level and on appeal that the procedures and administrative remedies offered were *inadequate, meaningless* and *futile.* The respondents/plaintiffs cited *Amato v. Bernard,* 618 F.2d 559 (1980, CA 9) as authority for their argument. The Ninth Circuit in that case was reviewing a lower court's order for summary judgment for defendants because plaintiffs failed to exhaust administrative remedies. The court cited the exception to the rule, i.e. futility and inadequacy but upheld the summary judgment stating:

> *The record is similarly devoid of evidence that it would be futile* for Amato *to pursue his claim administratively.* Indeed, the only argument Amato makes to show such futility is the one we have just considered and rejected, that his administrative remedies are inadequate. (Emphasis added)

When respondents/plaintiffs alleged inadequacy and futility of such remedies they directly put into question the adequacy of the remedies which was the very substance of respondents/plaintiff's claim. Respondents/plaintiffs recognized that the Arizona state courts made such a finding when they stated at page 9 of their petition for review in state court as follows:

> *The Court's finding that no exception to the exhaustion requirements applies* to the instant case fails to consider the evidence in the light most favorable to Plaintiffs, as is required in reviewing a motion for summary judgment. *In reaching its decision the Court resolved a number of factual issues adverse to Plaintiffs' position.* Each of the following issues is germane . . . (Emphasis added)

The merits of the respondents/plaintiff's claim below in the state court damage action were that respondents/plaintiffs were due certain due process procedures and procedures under the AWC handbook, and that they were denied these remedies and/or the remedies were *futile* or *inadequate* or *meaningless.* It makes no difference whether these remedies were classified as federal due process remedies or contractual handbook remedies. *Both the trial court and the Court of Appeals of Arizona found the remedies were adequate and were not meaningless or futile to pursue; these findings answered the very substance and merits of respondents/plaintiffs' state court claims.* The exhaustion of administrative remedies

question could not be reached if plaintiffs had proven that AWC had denied the plaintiffs adequate and meaningful remedies under the handbook. It is defendants' position that since plaintiffs could have brought their due process 42 U.S.C. Sec. 1983 issues in the state court at that time and they did not, under *Migra* they are now precluded from bringing such a second action because the Arizona preclusion law so dictates.

ARGUMENT #2

The U.S. Ninth Circuit Court of Appeals committed obvious error when they reversed the Arizona Federal District Court and remanded the case ". . . *for consideration of these issues* [due process] *which were not encompassed* within any state court litigation between these parties", because said due process issues were *obviously* "encompassed" in the Arizona State Court litigation.

In in the state court action subsequent to the award of summary judgment to the defendants, plaintiffs / respondents continued to argue lack of *due process,* violation of handbook procedures and that the procedures offered were **inadequate, futile** and **meaningless.**

In plaintiff/respondent's motion for new trial in the state court dated May 13, 1982 they stated as follows: (at page 7)

> Judge Nabours' ruling in action no. 38653 was reversed by the Court of Appeals of Arizona on March 4, 1980. *Cooper v. Arizona Western College District Governing Board,* 125 Ariz. 463, 610 P.2d 465 (1980). The reversal of Judge Nabours' initial ruling required the resolution of the due process issues raised in the Federal Court action. *These due process issues appear to*

have become incorporated into the present damage actions through defendants' Motion for Summary Judgment.

Plaintiffs directly put due process and the adequacy of the offered remedies at issue in the state damage action. This can be seen by looking at the order for judgment in the state trial court and opinion from the Court of Appeals (see said order set out verbatim in the appendix C-1 to the petition for writ of certiorari, and the order and Memorandum Decision of the Court of Appeals for the State of Arizona set out in the appendix B-1 to the petition for writ of certiorari).

The fact that the state trial court judge found that plaintiffs failed to exhaust their administrative remedies is consistent with his further finding, and that of the Court of Appeals of the State of Arizona, that the due process procedures and hearing offered as remedies were adequate and were not meaningless.

You cannot reach an exhaustion of administrative remedies finding without reviewing what remedies were offered. In other words the judges had to look to see what remedies were offered to the plaintiffs to see if they were adequate and meaningful so as to comport with due process and/or the handbook. It is obvious that the trial court and the Court of Appeals in Arizona specifically found the remedies offered by the defendants comported with due process and those findings necessarily would have to be included in any findings or decision that the plaintiffs failed to exhaust the administrative due process and/or handbook remedies offered. An appellate court may affirm on any ground squarely presented on the record (see *Jacobson v. Tahoe Regional Planning Agency,* 558 F.2d 928 (CA 9, 1977)) and that is what the Arizona Court of Appeals did when it also found that what AWC offered as remedies were

not inadequate, meaningless, and futile and that they further comported with due process.

Federal cases have drawn a clear distinction between cases where the issue is exhaustion of administrative remedies and those cases where the issue is alleged unconstitutional conduct that is something other than the failure to provide a due process hearing. See *Bass v. Spitz,* 510 F.Supp. 182, (1981) footnote 89 at page 184 and *Suckle v. Madison General Hospital,* 499 F.2d at 1367 (1974).

In this case the respondents/plaintiffs put due process at issue at the state court level. Their responsive briefs at the trial court level, their briefs in the Arizona Court of Appeals, their Motion for Reconsideration before the Court of Appeals of the State of Arizona and their Petition for Review before the Supreme Court of the State of Arizona all contain arguments that the due process procedures offered were **futile** and **meaningless** and therefore there was an exception to the doctrine of exhaustion in the State of Arizona. If the plaintiffs had proved that the offered due process was futile or meaningless their position would have been upheld and summary judgment would not have been granted or upheld. The respondents/plaintiffs' claims that they were denied due process presented a federal constitutional question which state courts are competent to decide (see *Brown v. DeLayo,* 498 F.2d 1173 (1974, 10th Cir.)). Respondents/Plaintiffs' appellate procedure, after the finality of the Arizona state judgment, was to seek certiorari review in the United States Supreme court pursuant to 28 U.S.C. Sec. 1257(3).

Even if the due process issues were not tried, the plaintiffs had the opportunity to bring their 42 U.S.C. Sec. 1983 action in state court before the final state court judgment was rendered and because they did not

pursue it they are now precluded under the *Migra* decision from so proceeding in federal court

ARGUMENT #3

This petition for Writ of Certiorari is not premature under the circumstances.

This Petition for Writ of Certiorari is not premature under the facts of this case. *Migra* was recently affirmed and applied summarily by the U.S. Supreme Court in the case of *Virgil E. Tompkins etc., et al. v. Loraine Garguil,* No. 83-208. In that case the petition for writ of certiorari was granted and the judgment vacated and the case remanded to the United States Court of Appeals for the Second Circuit for futher consideration in light of *Migra.* No oral argument was held or additional briefs filed. This is what petitioner is requesting in this case. Merely because the petition for writ of certiorari is filed prior to a final judgment is not alone an absolute basis for denial of such petition.

Defendants/petitioners have filed a new motion for summary judgment in the Federal District Court based on the *Migra* decision and on the further grounds that a review of the due process issues will support findings of fact and conclusions of law in favor of the defendants/petitioners. Respondents/plaintiffs in their responsive brief to this motion reduced themselves to a personal attack on the below signed attorney attempting to obtain sanctions for filing the motion for summary judgment and alleging not only that *Migra* does not apply but that the Federal District Court should set this case for trial on the merits.

This case before the court was filed on approximately March 1 of 1977. It has involved multiple litigation. It has often been said that justice delayed may be no justice at all. This is especially true in protracted litiga-

tion such as here where the potential is a possible long trial in the federal district court, possibly before a jury, with great expense in time and money not only to the parties but to the court system. Further, there is the potential that with an adverse verdict to the defendants there will be another appeal to the U.S. Ninth Circuit with an ultimate new petition for writ of certiorari in the United States Supreme Court, again based on the *Migra* case. A petition for writ of certiorari at that time would again be only after much time, work, money and aggravation that could be avoided by a clear summary disposition by this court that the *Migra* preclusion rule does apply and that therefore Arizona preclusion laws must be reviewed by the federal district court to determine whether the plaintiffs are precluded from pursuing their claim in federal court.

Also, in regards to the Ninth Circuit's obvious error in finding that the due process issues were not encompassed within the state court litigation, *how can an apellate court not step in and rectify such an obvious error?* Even if the case is in an interim status, the rectification of that error will summarily dispose of the case. All one has to do to see the obvious error is to read the Arizona Court of Appeals' opinion (Appendix B to the Petition for Writ of Certiorari). It should make no sense to anyone including the judicial or legal professions or lay observers, who are so quick to criticize the system, to prolong litigation based on inflexible precepts that invariably melt away in the face of the "proper case".

CONCLUSION

The obvious error of the Ninth Circuit in finding that the due process issues were not encompassed within the state court litigation is so severe as to require immediate attention. **This blatant error is of the type that**

causes people to criticize and question the integrity of our judicial system. The Arizona Court of Appeals *specifically affirmed* the trial court's summary judgment finding that the remedies defendants AWC offered plaintiffs comported with *due process.* Therefore, the Ninth Circuit did not give the state judgment full faith and credit as they are required by 28 U.S.C. Sec. 1738. The case should be reversed based on that error.

Besides the obvious error of the Ninth Circuit, the *Migra* case and the subsequent Supreme Court case of *Tompkins v. Garguil,* cited supra, require this case to be *summarily remanded* to the Ninth Circuit for its remand to the Arizona Federal District Court with instructions to that court ". . . to conduct such further proceedings as are required by, and are consistent with this opinion *[Migra]*".

Respectfully submitted,

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